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Real Property: Alienability of a Possibility of Reverter

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awarded.[15] In one state, however, by virtue of statute, the appellate court is required to increase the verdict and render final judgment for the plaintiff when the jury has evidently misconstrued the instructions with respect to the amount of compensation or has arbitrarily sought to lighten the burden on defendant.[16]

A doctrine of modern origin, made statutory in Florida,[17] grants an appellate court the power to limit a new trial to a single issue.[18] The power is used with great caution in damage cases if there be any possibility that the jury has not settled the issue of the defendant's liability independently of the question of damages.[19] Since there was no dispute at the trial as to the proper elements of defendant's liability[20]—the employment of the broker and the securing of a bona fide purchaser who entered into a valid sales contract with the vendor—the plaintiff would have been entitled to a directed verdict on the question of liability. Therefore, on appeal, this would have been a proper case for granting a new trial limited to the question of damages.

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REAL PROPERTY: ALIENABILITY OF A POSSIBILITY OF REVERTER

Richardson v. Holman, 33 So.2d 641 (Fla. 1948)

Land was conveyed to the traction company upon the express condition that should the grantor cease to use the land for railroad purposes, the property would revert and pass to the grantor, his heirs, and assigns. The grantor purported to convey his remaining interest to the plaintiffs' predecessors. The traction company subsequently abandoned the land, and the plaintiffs brought ejectment against the defendant, who was in

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[15]Anderson v. Lewis, 64 W. Va. 297, 61 S. E. 160 (1908); *cf.* Faulkner v. Crawford, 119 Ark. 6, 177 S. W. 35 (1915); Woolf v. Hamburger, 201 Ill. App. 612 (1916); 2 SEDWICK, DAMAGES 1165 (9th ed. 1912).

[16]Glascock v. James, 183 Va. 561, 32 S. E.2d 734 (1945).

[17]FLA. STAT. 1941, §59.35 (Supp. 1945).

[18]Yazoo & M. V. R. R. v. Scott, 108 Miss. 871, 67 So. 491 (1915); MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 83 (1935).

[19]*Ibid.*

[20]Transcript of Record, Harrell v. Bishop, 33 So.2d 152 (Fla. 1948).

possession. The lower court sustained defendant's demurrer and dismissed the suit. Plaintiffs appealed. HELD, the deed to the traction company created a determinable fee, leaving a possibility of reverter in the grantor that could be transferred to the plaintiffs. Judgment reversed.

Although language similar to that in this reservation has been construed by other courts as a right of entry for condition broken,[1] there is ample authority to sustain the Florida court's construction that the interest remaining in the grantor was a possibility of reverter.[2]

At common law a possibility of reverter was considered personal to the grantor and, therefore, inalienable.[3] Today, however, many states have by statute made this interest alienable,[4] and at least two states have reached this result in the absence of statute.[5]

This is the first case in which the question of the alienability of a possibility of reverter has come before the Florida court; and, although a desirable result is reached, it is difficult to determine from the opinion the real basis of the decision. The statute apparently relied upon by the Florida court to permit the transfer of a possibility of reverter requires that transfers of estates or any uncertain interest therein be in writing.[6]

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[1]Dolby v. Dillman, 283 Mich. 609, 278 N. W. 694, 117 A. L. R. 538 (1938); Trustees of Union College v. City of New York, 73 N. Y. Supp. 51, 65 N. E. 853 (1903).

[2]Irby v. Smith, 147 Ga. 329, 93 S. E. 877 (1917); North v. Graham, 325 Ill. 178, 85 N. E. 267, 18 L. R. A. (NS) 624 (1908); Stewart v. Blain (Tex. Civ. App.), 159 S. W. 928 (1913).

[3]Union Colony Co. v. Gallie, 104 Colo. 46, 88 P.2d 120 (1939); Cookman v. Silliman, 22 Ch. 303, 2 A.2d 166 (Del. 1938); Pure Oil Co. v. Miller-Macfarland Drilling Co., 376 Ill. 486, 34 N. E.2d 854, 135 A. L. R. 567 (1941); North v. Graham, 235 Ill. 178, 85 N. E. 267, 18 L. R. A. (NS) 624 (1908); Pond v. Douglas, 106 Me. 85, 75 Atl. 320 (1909); Magness v. Kerr, 120 Ore. 373, 254 Pac. 1012, 51 A. L. R. 1466 (1927); Atkins v. Gillespie, 156 Tenn. 137, 299 S. W. 776 (1927); Lampet's Case, 10 Co. Rep. 46b, 77 Eng. Rep. 994 (1612).

[4]Kennedy v. Kennedy, 183 Ga. 432, 188 S. E. 722, 109 A. L. R. 1143 (1936); Fall Creek Township of Madison County v. Shuman, 55 Ind. App. 232, 103 N. E. 677 (1913); Green's Adm'r v. Irvine, 23 Ky. L. 1762, 66 S. W. 278 (1902); Hamilton v. City of Jackson, 157 Miss. 284, 127 So. 302 (1930); Kassner v. Alexander Drug Co.. 194 Okla. 36, 147 P.2d 979 (1944); Copenhaver v. Pendleton, 155 Va. 463, 155 S. E. 802, 77 A. L. R. 324 (1930).

[5]Slegle v. Lauer, 148 Pa. 236, 23 Atl. 966, 15 L. R. A. 547 (1892); Sheetz v. Fitzwater, 5 Pa. 126 (1847); Collette v. Town of Charlotte, 114 Vt. 357, 45 A.2d 203 (1946); RESTATEMENT, PROPERTY §159.

[6]FLA. STAT. 1941, §689.01.

It was reasoned that since transfers of uncertain interests must be in writing, the statute contemplated that uncertain interests, including a possibility of reverter, could be conveyed. The statute is in substantially the same language as the third section of the original English Statute of Frauds enacted in 1677,[7] but in England a possibility of reverter was not alienable until made so by statute in 1845.[8] The Statute of Frauds neither creates nor enlarges any estate or interest but merely prescribes the method by which a transferable interest may be conveyed. It is, therefore, wholly inapplicable to the problem in this case.

The result reached by the Florida court, however, can be sustained on non-statutory grounds. Although the common law of England was adopted by Florida,[9] and although Florida courts have scrupulously followed the common law,[10] this does not mean that that body of law was irrevocably frozen as of that date so as to preclude the Florida Supreme Court from interpreting the law in the normal manner of the judiciary as it evolves under changing social and economic conditions.[11] The common law rule against alienability may be traced to an inability to conceive of a transfer of mere title or right as separate from possession,[12] and the consequent fear of maintenance resulting from the buying up of contingencies to stir up litigation.[13] These reasons are no longer of practical importance.[14] The jurist of today has no difficulty in separating ownership in fee from possession, as for example in trusts.[15] The laws of champerty and maintenance have required only a very limited

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[7]29 CAR. II, c. 3, §3.

[8]Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 6. *See* Copenhaver v. Pendleton, 155 Va. 463, 155 S. E. 802, 808, 77 A. L. R. 324, 332 (1930).

[9]FLA. STAT. 1941, §2.01.

[10]*See, e.g.,* Florida Ind. Comm. v. State, 155 Fla. 772, 784, 21 So.2d 599, 605 (1945).

[11]Layne v. Tribune Co., 108 Fla. 177, 185, 146 So. 234, 237 (1933); Waller v. First Savings & Trust Co., 103 Fla. 1025, 138 So. 780 (1931); CARDOZO, THE NATURE OF THE JUDICIAL PROCESSS, *passim.*

[12]See Perry v. Smith, (Tex. Civ. App.), 321 S. W. 340, 341 (1921); note, L. R. A. 1916F 311; Maitland, *Mystery of Seisin,* 2 LAW Q. REV. 481, 489, 495 (1886); Ames, *Dissesisin of Chattels,* 3 HARV. L. REV. 23 (1890).

[13]*See* Collette v. Town of Charlotte, 114 Vt. 357, 45 A.2d 203, 206 (1946); Perry v. Smith (Tex. Civ. App.), 231 S. W. 340, 341 (1921); Co. Litt. 214a.

[14]Note, L. R. A. 1916F 311.

[15]*See, e.g.,* Dolby v. Dillman, 283 Mich. 609, 278 N. E. 694, 117 A. L. R. 538, 553 (1938) (dissenting opinion).